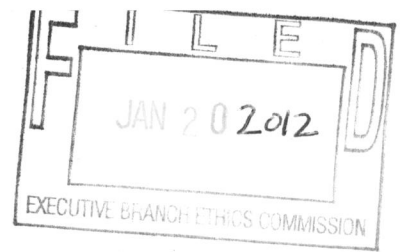


**COMMONWEALTH OF KENTUCKY  
EXECUTIVE BRANCH ETHICS COMMISSION  
AGENCY NO. 08-014  
ADMINISTRATIVE ACTION NO. 08-EBEC-0335**



EXECUTIVE BRANCH ETHICS COMMISSION

COMPLAINANT

vs.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,  
RECOMMENDED ORDER AND NOTICE OF APPEAL RIGHTS**

PHILIP R. MOBLEY

RESPONDENT

\* \* \* \* \*

An Administrative Hearing was held in this matter on November 2, 2011. The Complainant, Kentucky Executive Branch Ethics Commission, was represented by Kathryn H. Gabhart, General Counsel, with John Steffen, Executive Director, as Co-Counsel. The Respondent, Philip R. Mobley, was represented by Luke Morgan, McBrayer McGinnis Leslie & Kirkland, and Bobby H. Richardson, Richardson Gardner Barrickman & Alexander. The Hearing was presided over by Susan S. Durant, Hearing Officer, Administrative Hearings, Office of the Attorney General. JoJuana Leavell-Greene, Human Resources Branch Manager for PVA Administrative Support, Department of Revenue, and Mr. Mobley testified.

The issue in this matter is whether Philip Mobley as PVA of Clay County violated KRS 11A.020(1)(c) by using his official position or office to obtain financial gain for his wife, Donna Mobley, when he requested her hiring on December 4, 2006, as General Deputy Principal in the Clay County PVA Office. It is concluded that Philip Mobley did violate the cited statute.

**BRIEF PROCEDURAL BACKGROUND**

1. The procedural background for Administrative Actions 08-EBEC-0334 through 08-EBEC-0344 are all the same. The Findings of Fact, Conclusions of Law, and Recommended Order vary according to the evidence presented at the Hearing in each case and the legal arguments made in each case.

2. On October 7, 2008, an Initiating Order was filed in this matter by the Executive Branch Ethics Commission. The Initiating Order in regard to Philip Mobley was one of eleven initiating orders charging various Property Valuation Administrators (PVAs) throughout the Commonwealth with violating KRS 11A.020(1)(c). The charged statute states:

(1) No public servant, by himself or through others, shall knowingly:

.....

(c) Use his official position or office to obtain financial gain for himself or any member of the public servant's family.. . . .

All of the PVAs were charged with violating the Executive Branch Code of Ethics because they employed and/or promoted members of their families.

3. On October 30, 2008, Mobley, along with the other PVAs, filed an Answer to the Initiating Order. On December 2, 2008, the PVAs, who were all represented by the same two attorneys, filed an Agreed Order Holding Administrative Actions in Abeyance.

4. The administrative actions were stayed while the PVAs prosecuted a declaratory judgment action in Franklin Circuit Court. In that action the PVAs asserted that they were not "public servants" or "officers" as defined in KRS 11A and thus were not subject to the jurisdiction of the Executive Branch Ethics Commission. The Franklin Circuit Court judge agreed that the Executive Branch Code of Ethics did not apply to PVAs. The Executive Branch Ethics Commission appealed the Franklin Circuit Court judgment to the Kentucky Court of Appeals. On June 18, 2010, the Court of Appeals in an unanimous decision reversed the Franklin Circuit Court judgment. *See, Kentucky Executive Branch Ethics Commission v. Atkinson*, 339 S.W.3d 472 (Ky. App. 2011). On June 9, 2011, the Kentucky Supreme Court denied discretionary review.

5. On June 13, 2011, Franklin Circuit Court issued an Order of Dismissal that lifted the abeyance of this administrative action. On July 26, 2011, the parties agreed to hearing dates

for the first five PVAs' actions to be heard.

### **FINDINGS OF FACT**

6. When the previous Clay County PVA retired, Philip Mobley ran for the position of Property Valuation Administrator in Clay County, Kentucky, in November, 2006. On December 4, Mobley was sworn in after his election victory. Mobley had been an employee in the PVA Office. Then he had been the Family Court Administrator in Clay County, Exhibit 5 to the Hearing (Hereinafter cited as Ex. \_\_\_), before returning to the PVA Office as a field representative just prior to his election.

7. Donna Mobley, Philip's wife, was the Chief Deputy Clerk at the Clay Circuit Court Clerk's Office at the time of his election. She had been with the Circuit Court Clerk's Office for 17 years. According to Philip, he contacted the PVA office in the Department of Revenue in mid- November, 2006, after his election and before being sworn in, about his hiring Donna in the Clay County PVA Office. *See* Ex. 6.

8. On November 28, 2006, after his wife had given notice to the Circuit Court Clerk that she intended to quit her current job and work for her husband, Mobley attended an orientation for newly elected PVAs. Toward the end of the program, Jill LeMaster, who was the Executive Director of the Executive Branch Ethics Commission, gave a presentation about the Executive Branch Code of Ethics. One of the points stressed by LeMaster was Executive Branch Ethics Commission Advisory Opinion 04-34. That Advisory Opinion states:

However, the Commission believes that KRS 11A.020(1)(a)(c) and (d) serve to prohibit a public servant from advocating or influencing in any way the employment, appointment, promotion, transfer, or advancement of a member of the public servant's family to an executive branch position of employment that the public servant directly supervises or manages.

Ex. 8.

9. Mobley clearly understood that Advisory Opinion 04-34 meant that PVAs should not hire family members. As he testified, LeMaster's presentation caused a "big ruckus." Transcript of the Hearing at 112. (Hereinafter cited as Tr. at \_\_\_\_.) According to Mobley, "I was sitting toward the back and behind me was Bruce Lominac, an attorney, that just had been elected PVA, and he stood up and told her, you cannot say that, you cannot do that." Tr. at 112. Mobley described Lominac as going "berserk" and "screaming," Tr. at 123-124. Mobley stated that the proscription against hiring relatives was something new: "I had worked at the PVA previously and I knew, you know, lots of PVAs and their families worked in the office, I mean, it was very common." Tr. 113. Donna had already quit at the Circuit Clerk's office and was getting ready to begin working for him. Mobley discussed PVA employment rights more with Lominac and with another attorney. They both said that the Commission had no authority to determine who worked for a PVA and that the best idea was for Mobley to go forward with Donna's appointment. Tr. at 115-116. Philip's signature on Donna's initial RPA is December 4, 2006. Mobley did not ask Revenue for guidance nor did he contact the Executive Branch Ethics Commission about the situation. Tr. at 116, 123.

10. On December 4, 2006, Donna Mobley began as a General Deputy Principal in the PVA Office. Donna was credited with 16 years work experience. Her pay grade was 10 and she received 10% above the minimum salary because of her experience. Donna's appointment was effective on December 4, 2006, the same date that Philip assumed office. Ex. 1. According to Philip's testimony, Donna filled the vacancy in the PVA office created by his election.

11. JoJuana Leavell-Greene, Human Resources Branch Manager for PVA Administrative Support, Department of Revenue, explained that only the PVA can recommend a person for employment in the county PVA office. According to Leavell-Greene, "the PVA will

interview and select the best candidate in his office.” Tr. at 25. Leavell-Greene then signs off on the Request for Personnel Action (RPA) as “approved,” meaning that there is a vacancy and the candidate has the experience for the grade. Once Leavell-Greene is sure that the candidate’s qualifications and the position are proper the employee is entered into the state payroll system.

12. Six months after Donna was initially appointed, Mobley completed another Request for Personnel Action in regard to Donna Mobley. The second RPA concerned a six months salary change. The six months salary adjustment resulted in a 5% pay increase for Donna Mobley. Leavell-Greene described the request as “discretionary.” Ex. 2; Tr. at 27.

13. Donna was able to transfer her years of service and her accrued vacation and sick leave over to the PVA office. Tr. at 60-61. However, even after her six months adjustment, she still made approximately \$3,000 a year less than she was making at the Circuit Clerk’s office. Tr. at 101-102. In terms of the hierarchical structure of the office, the Chief Deputy and the Office Manager were above Donna Mobley. However, Philip conceded that he was Donna’s supervisor. Tr. at 88. He is the person with the authority to hire, promote, and fire. Tr.124-125.

14. Philip testified that he did not interview anyone else for the position that Donna was hired for. Tr. at 94: “I wanted her to be the face of my office.” Tr. at 105. He emphasized that Donna had been working with the public in the Circuit Clerk’s office. She was an excellent worker and was dependable. She fit well with the employees who were already in the office. “She knows most of the people in my county on a first name basis and people love her and like her and that’s who I wanted in the front office and it’s worked out well for me. I ran unopposed in 2010, so I must be doing something right.” Tr. at 136.

#### **CONCLUSIONS OF LAW**

15. KRS 11A.020 provides:

(1) No public servant, by himself or through others, shall knowingly:

....

(c) Use his official position or office to obtain financial gain for himself or any member of the public servant's family.. . .

The provision, as part of the Executive Branch Code of Ethics, became effective on July 14, 1992, and has not been amended subsequently.

16. In his closing argument, Mobley argued initially that he did not violate the statute because he did not "use his official position or office" for the benefit of Donna Mobley. Mobley placed the blame for Donna's appointment squarely on the Department of Revenue referring to "Revenue's obligation to be the gate-keeper of PVA's personnel decisions," "the Respondent did not hire Donna, Revenue did," and "Revenue is the sole arbiter of this hiring decision." Respondent's Proposed Recommendations of Law at 3, 4. (Hereinafter cited as Resp. at \_\_.)

17. As Leavell-Greene explained, Revenue's role in regard to PVA employees is limited to making sure that the information is correct for payroll purposes. KRS 132.590(8), which is cited by the Respondent, indicates that the PVA "appoints" his employees, who "may be removed at the pleasure of the property valuation administrator." Salaries of deputies are fixed by the PVA in accordance with the grade classification system established by the Department of Revenue. The testimony was clear that the PVA selects, interviews, appoints, promotes, and fires all deputies. Revenue does not review family relationships in regard to RPAs. Revenue is not the enforcer of the Executive Branch Code of Ethics. It is the Executive Branch Ethics Commission who enforces the Code. KRS 11A.080; KRS 11A.100.

18. The second flaw in the statutory charge according to Mobley is that "financial gain" must be "unwarranted or in conflict with the interests of the public at large." Initially, it must be observed that the policy behind the Code of Ethics begins:

It is the public policy of this Commonwealth that a public servant shall work for

the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

(a) A public servant be independent and impartial;

....

(c) A public servant not use public office to obtain private benefits; and

(d) The public has confidence in the integrity of its government and public servants.

KRS 11A.005(1). Justice Stephens' concurrence in *Caudill v. Judicial Ethics Committee*, 986 S.W. 2d 435 (Ky. 1999), which is favorably referenced by Mobley, appears to be especially useful in the context of this matter. The problem with financial gain connected with nepotism, which is a particular form of favoritism, is as Justice Stephens concluded:

The evil that I believe anti-nepotism provisions are designed to combat is the appearance of impropriety which has the inevitable effect of undermining the public's trust in a given institution.

*Id.*, at 439. As the Complainant Commission has emphasized, what is at issue is not Donna Mobley's qualifications or her salary, it is the favoritism in which one out of four budgeted deputies in the Clay County PVA Office was selected because of her marital ties for a position that is completely under the control of her spouse. Without such a prohibition, an elected public office can become dynastic.

19. Mobley also raises as an affirmative defense "Violation of the doctrine of *stare decisis*." According to *Black's Law Dictionary*, Seventh Edition, *stare decisis* is: "The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." Mobley argues that the Ethics Commission violated *stare decisis* because in Advisory Opinion 93-94 it stated that KRS 11A.020 (1)(c) contained no prohibition to the employment of family members and in Advisory Opinion 04-34 it stated that KRS 11A.020 (1)(c) prohibited such employment.

20. In the first year of its existence, the Executive Branch Ethics Commission, under

the authority of KRS 11A.110(1) issued Advisory Opinion 92-10 which concluded that PVAs were covered by the Executive Branch Code of Ethics. Advisory Opinion 93-24 then followed in response to a query as to whether the Executive Branch Code of Ethics “disallowed” PVAs to employ relatives. Advisory Opinion 93-24 stated “the Executive Branch Code of Ethics does not specifically prohibit the employment of relatives in PVA offices. However....” [Emphasis added.] The Commission then cited KRS 11A.020(1)(a) and (c) and concluded: “The Commission envisions certain circumstances where conflicts of interest could arise under such employment. The Commission encourages your agency to follow policies to avoid any real or perceived conflict of interest in this area.” Ex. 7. In short, the Commission did not state that the Code prohibited nepotism, but it warned that employing family members could create conflicts of interest. Advisory Opinion 93-24 seemed to issue a “word to the wise,” the Commission knowing that many PVAs traditionally had family members in their offices.

21. In its post-hearing closing the Ethics Commission agreed that 93-24 did state that family members could work in the same office—but family favoritism would not be permitted. A PVA could create a conflict of interest by hiring members of his own family. The Opinion indicated that family members already employed in an office when the Code became effective could remain.

22. On September 30, 2004, the Commission on its own motion again took up the issue of family members being employed in the same state agency as a public servant. The occasion was investigations within the Department of Parks which revealed that Parks and other state agencies needed further guidance. Advisory Opinion 04-34 again recited KRS 11A.020(1) and then proceeded to more explicitly set out problem areas:

[T]he Commission believes that KRS 11A.020(1)(a), (c) and (d) serve to prohibit a public servant from advocating or influencing in any way the



employment, appointment, promotion, transfer, advancement of a member of the public servant's family to an executive branch position of employment that the public servant directly supervises or manages.

Specifically, employees should not be involved in interviewing, recommending, or approving family members for positions within their employing agencies . . . .

The Advisory Opinion commended the Parks Department for the fact that it was drafting and implementing policies and procedures that would address nepotism. Ex. 8. Again, the Commission was issuing "a word to the wise"—this time the word was that agencies should put their own houses in order to forestall outside enforcement.

23. It was this Advisory Opinion that created such an uproar when Jill LeMaster pointed out it prohibited PVAs' hiring their own family members.

24. On July 29, 2007, the Ethics Commission issued Advisory Opinion 07-19 which again reviewed nepotism under the Code of Ethics and amended Advisory Opinion 04-34. The Opinion stated that Advisory Opinion 04-34 pointed out that KRS 11A.020(1)(a), (c), and (d) prohibited advocating or influencing employment actions in regard to family members. The Opinion then took up the persistent problem of how to deal fairly with family members who were already under the supervision of a family member and had been for many years. The Opinion reiterated that since the publication of Advisory Opinion 04-34, public servants should not have been involved in the employment, supervision, or promotion of family members." Ex. 9.

25. Advisory Opinion 07-19 urged a layer of supervision between a family member and a public servant to remove as much potential for conflict as possible. Mobley thought that Donna had two layers of supervision between herself and Philip.

26. Thus, the advisory opinions have not been uniformly hard-nosed about conflicts of interest in the form of nepotism in regard to public servants but they have consistently said that public servants' employing, promoting, and supervising their family members created

conflicts of interest. The Advisory Opinions started out gently in their warnings in 93-24; became quite firm in 04-34; and then relented a bit in 07-19 in regard to previously employed family members.

27. Although it is useful to point out that the advisory opinions wavered a bit in the firmness with which they dealt with family members in the same office with a public servant, *stare decisis* is not relevant to this matter. Advisory opinions are just “opinions.” They offer guidance; they are not judicial precedents established through litigation.

28. Mobley also offered as an affirmative defense “Violation of the Doctrine of Contemporaneous Construction.” This doctrine used in this context is quite similar to *stare decisis*. The doctrine as defined in *Hagan v. Farris*, 807 S.W.2d 488, 490 ( Ky., 1991) means that “In most cases, an agency’s interpretation of its own regulations is entitled to substantial deference. ... A construction of a law or regulation by officers of an agency continued without interruption for a long period of time is entitled to controlling weight.” In this instance according to Mobley, advisory opinions are used as regulations. Therefore, because of contemporaneous construction, as stated in *In re Hughes & Coleman*, 60 S.W.3d 540, 543 (Ky., 2001): “An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. ...”

29. Because Mobley interpreted 93-24 to mean that family members were permitted to be hired, 04-34 was an about-face. The Hearing Officer, as previously stated, concludes that the focus of the nepotism opinions shifted slightly but there was no significant contradiction. Advisory Opinions 93-24, 04-34, and 07-19 were rational elaborations that provided a coherent chain of advice.

30. The final legal argument made by Mobley was that the Commission had violated

KRS 13A.120 by issuing unauthorized guidance concerning conflicts of interest and nepotism in the advisory opinions and by not promulgating specific anti-nepotism regulations. KRS 11A.110 (1) clearly gives the Commission the authority to “issue and publish advisory opinions on the requirements of this chapter for those who wish to use the opinions to guide their own conduct.” Mobley also suggested that OAG Opinion 88-15 which found “no specific authorizing regulation for the Personnel Commissioner and the Personnel Board to promulgate regulations concerning nepotism,” somehow prohibited the Executive Branch Ethics Commission from concerning itself with nepotism. The Hearing Officer does not find it persuasive to argue that because the Personnel Board or the Personnel Commission cannot promulgate regulations against nepotism, the Legislature could not give the statutory authority to deter conflicts of interest or favoritism in the form of nepotism in the executive branch to another administrative body.

31. Finally, Mobley offered Governor Steven Beshear’s Executive Order of June 2, 2008, as a standard against which to judge the arbitrariness of the Commission’s actions in charging Mobley with violating KRS 11A.020(1)(c). That Executive Order stated that it is the Commonwealth’s policy to provide equal employment opportunity to all people without discrimination because of race, color...ancestry....” The Hearing Officer agrees that this broad affirmative policy set out in an Executive Order opens the doors of opportunity to all within the state. The practice of nepotism, however, means that the door keeper only lets those related by birth or marriage enter the door of opportunity. The Commission’s view of KRS 11A.020(1)(c) supports public trust, impartiality, and the integrity of public servants. It compliments the Executive Order of June 2, 2008.

32. It is to be stressed that this case was brought under KRS 11A.020 (1)(c)—no Advisory Opinion was cited in the Initiating Order. The Advisory Opinions are useful in

providing guidance, but the foundation of the complaint against Mobley is the statute. The evidence presented at the Hearing is that Mobley was specifically informed, after his election and before he appointed his wife, about the content of Advisory Opinion 04-34. Further, Mobley, like all citizens, is presumed to be familiar with the law of the state:

It is well established that all persons are charged with knowledge of the laws pertaining to their conduct. *Flint v. Executive Branch Ethics Commission*, 981 S.W.2d 132, 134 (Ky. App., 1998).

The statute states: “ No public servant, by himself or through others, shall knowingly ...use his official position or office to obtain financial gain for himself or any member of the public servant’s family... .”

33. Mobley chose not to believe Jill LeMaster and chose to believe Lominac and another unnamed attorney. The evidence presented at the Hearing was clear and convincing that Mobley knowingly used his new position as PVA to obtain financial gain for Donna Mobley. It was useful for Mobley to not believe the advice in Advisory Opinion 04-34 because his disbelief was helpful to his ambitions, to his wife, and to his office. Donna’s salary may have been reduced but the stability of her employment was increased as were Mobley’s re-election prospects. It is to be observed that Mobley followed his beliefs all of the way toward the Kentucky Supreme Court. *Kentucky Executive Branch Ethics Commission v. Atkinson*, 339 S.W. 3d 472 (Ky. App. 2011), determined that Mobley and all PVAs are “public servants” and thus are under the requirements of the Executive Branch Code of Ethics.

34. The Complainant has never argued that Donna Mobley should be dismissed from her employment. However, Philip Mobley should cease and desist from granting his wife any discretionary promotions or pay increases. Mobley should post a copy of KRS 11A.020 prominently in a public place in his office as a reminder of the law. Because Mobley made a

good faith attempt to determine the full requirements of the law, he should pay a reduced penalty of \$2,000.

### **RECOMMENDED ORDER**

On the basis of the above Findings of Fact and Conclusions of Law, it is recommended that Philip Mobley be ordered to cease and desist any further violation of KRS 11A.020(1)(c) such as granting his wife any discretionary promotions or pay increases; to post a copy of KRS 11A.020 prominently in a public place in his office as a reminder of the law; and to pay a civil penalty of \$2,000 to the Executive Branch Ethics Commission.

### **NOTICE OF EXCEPTION AND APPEAL RIGHTS**

Pursuant to KRS 13B.110 (4) you have the right to file exceptions to this recommended decision:

- (4) A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head.

In order to preserve a right to review by the circuit court, case law requires that a litigant must file exceptions with the board or agency if there is anything in the recommended order with which a party does not agree and desires to appeal.

You have a right to appeal the Final Order of the agency pursuant to KRS 13B.140 which reads in part:

- (1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 23A.010(4), "Such review [by the Circuit Court] shall not constitute an appeal but an original action." The Court of Appeals has suggested that an appeal to circuit court is

commenced upon the filing of the appeal petition and the issuance of a summons within the 30-day time period for filing an appeal.

SO RECOMMENDED this 19<sup>th</sup> day of January, 2012.



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#### CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was mailed this 19th day of January, 2012, by messenger mail, to:

DEBBIE BRISCOE  
EXECUTIVE ASSISTANT  
EXECUTIVE BRANCH ETHICS COMM  
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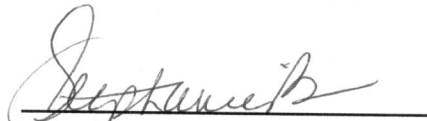
for filing; and a true copy was sent by first-class mail, postage prepaid, to:

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